91-1383

Supreme Court, U.S.
FILED
FEB 26 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

CLAYTON JOEL FLOWERS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

*THOMAS W. SORRELLS
ASSISTANT ALABAMA ATTORNEY GENERAL

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY FOR THE
28TH JUDICIAL CIRCUIT
OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Attorney of Record

QUESTION PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari and overrule the holding of the Alabama Court of Criminal Appeals which decided a substantial federal question when it held that the death sentence of the Respondent should be vacated under Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals vacating the Respondent's death sentence has not yet been reported. A copy of this opinion is reproduced as Appendix A to this petition.

2. The opinion of the Alabama Court of Criminal Appeals denying the Petitioner's motion for rehearing has not yet been reported. A copy of this opinion is reproduced as Appendix B to this petition.

3. The order of the Supreme Court of Alabama denying the Petitioner's petition for writ of certiorari has not yet been reported. A copy of this order has been reproduced as Appendix C to this petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
THE PARTIES.....	ii
OPINIONS BELOW.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF CASES.....	v
TABLE OF OTHER AUTHORITIES..	v
STATEMENT OF JURISDICTION....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	8
CONCLUSION.....	18

TABLE OF CASES

	PAGE(S)
Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976).....	9
LeCroy v. Florida, 533 So. 2d 750, cert. denied, 109 S. Ct. 3262.....	14
Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989)..	16
Thompson v. Oklahoma, 487 U.S. 815 (1988)...	8

TABLE OF OTHER AUTHORITIES

	PAGE(S)
Code of Alabama (1975)	
Title 12-15-34(a)(1)..	13
Title 13A-5-51(7).....	14

STATEMENT OF JURISDICTION

Petitioner seeks review of a final decision of the Alabama Supreme Court issued on December 6, 1991, denying certiorari to the Alabama Court of Criminal Appeals' decision of July 26, 1991 vacating the Respondent's death sentence. The State has filed this petition within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

On February 3, 1989, the Respondent was indicted by the Grand Jury of Baldwin County, Alabama for the offense of capital murder in violation of §13A-5-40(a)(3), Code of Alabama, 1975. (R. 1198-1199) A jury trial was held on this matter on September 2, 1989. The Alabama Court of Criminal Appeals stated the following concerning the facts of this case:

> "At approximately 1:00 a.m. on the morning of June 5, 1990, Melissa Stone saw Karen Rolin at the Delchamps grocery store in Bay Minette with two young boys. Later that morning, the body of Karen Rolin was found floating under the Hollinger Creek Road bridge in Baldwin County, Alabama. A tire tool and a tire jack were found near the body. There was blood on the bridge and on the guard rail of the bridge. That same morning, the victim's car was found some distance away in Forest Park Lake.
>
> "The appellant gave two statements regarding the victim's death, the first to the Bay Minette Police Department and the second to the Baldwin County Sheriff's Department. The following is a summary of those statements. In the early morning

hours of June 5, 1990, the appellant and Bill Caraway were at Raymond White's house when the victim picked them up. The three went to Delchamps, where the victim attempted to cash her paycheck and then they got some gasoline. At this point, Caraway was driving, and he drove to Pine Grove Middle School. There, the victim said she wanted to have sex with the appellant, and they did. The appellant said the he used a condom. Afterwards, Caraway wanted to have sex with her. At this point, they all got out of the car and the appellant sat on the trunk of the car. The victim performed oral sex on the appellant while Caraway had anal intercourse with her. The appellant said that he had anal intercourse with the victim also. They then got back into the car and Caraway drove to Hollinger Creek Road bridge where Caraway got out of the car and told the appellant to get out. Caraway told the appellant that he wanted to "shut her mouth." Caraway then went and opened the trunk and told the victim to get out of the car. The appellant told Caraway that he did not want to be involved, and he got back in the car. Caraway began hitting the victim with his fists and a tire tool and then he told the appellant to get out of the car. When the appellant got out, Caraway handed him the tire tool and told him to hit the victim. The appellant threw down the tire tool. Then Caraway handed the appellant a tire jack,

and the appellant hit the victim with it one time, but he thought that she was already dead. Caraway and the appellant then dragged the victim across the bridge and threw her body into the creek. Caraway and the appellant drove to Forest Park Lake. Caraway wedged a stick against the accelerator of the victim's car, and the car went into the lake. Caraway and the appellant then went to White's house and White took him home.

"Dr. Leroy Riddick performed the autopsy on the victim's body. The autopsy revealed numerous lacerations to the head and face, multiple fractures to the skull, and defensive wounds to the arms. Dr. Riddick testified that the victim died of multiple blunt force injuries to the head and that those injuries could have been caused by a tire jack. The autopsy also revealed the presence of six tears around the anus and that semen was present in the anus. Riddick stated that the tears to the anus would have been painful.

"Forensic tests showed that blood found on the victim's car was the same type as the victim's blood. A footprint impression taken near a pool of blood on the bridge matched the shoeprint of one of the appellant's shoes. Vaginal swabs taken from the victim were negative for the presence of seminal fluid but anal swabs taken from the victim were

positive for the presence of seminal fluid. No semen was found in a condom which was found in the victim's car. Twelve of the victim's finger prints or palm prints were found on the top of the trunk of her car. Thirteen of the appellant's finger prints and palm prints were found on various places inside and outside of the victim's car. Two of the appellant's palm prints were found overlapping two of the victim's palm prints on the trunk. The palm prints of the appellant and the victim were facing different directions. The appellant's and the victim's palm prints were also found on the driver's window.

"The appellant's testimony at trial differed somewhat from his statements which were given to the police. The appellant testified that after he and the victim had had consensual sex at the Pine Grove Middle School, Caraway got in the backseat with the victim and the appellant took a walk. A while later, Caraway called him back to the car. The victim seemed upset and Caraway was mad. Caraway then drove to Hollinger Creek Road bridge where he stopped and told the appellant that he needed to talk to him outside of the car. The appellant got out of the car and Caraway opened the trunk and said "We need to make sure she don't say anything" because "she wouldn't give it to me, so I took it." The appellant replied that he "wasn't going to have no part of this." Caraway

> told the victim to get out of the car, and the appellant got. back into the car and listened to the radio. A few minutes later, Caraway told the appellant to get out of the car. When he did, the appellant saw the victim lying on the ground and saw Caraway with a tire tool in his hand. Caraway handed him the tire tool and told the appellant to hit the victim. The appellant threw it down. Caraway then handed the appellant the tire jack and said, "Hit her with this or I will hit you with it." The appellant then threw the jack down and he vomited. He doesn't remember whether he hit the victim with the jack. The appellant heard a splash and then heard the trunk close. He and Caraway got back in the car and drove to Forest Park Lake. The appellant got out of the car and started walking. He heard the sound of a motor and a splash. The appellant and Caraway then returned to White's house. (Appendix A, pages 2-5)

The jury returned a verdict of guilty as to capital murder (murder during the course of sodomy) and recommended a sentence of life imprisonment without parole.[1] (Record-1281)

---

[1]The vote of the jury consisted of one (1) vote for death and eleven (11) votes for life without parole.

On February 23, 1990, the trial court conducted a sentencing hearing, at the conclusion of which the Court entered a sentence of death by electrocution. (R. 1286-1293) On July 26, 1991, the Alabama Court of Criminal Appeals vacated the death sentence of the Respondent who was fifteen (15) years of age at the time of the offense. (Appendix A) On appeal, the Respondent argued that the trial court was precluded from sentencing him to death because of his age under authority of Thompson v. Oklahoma.[2]

On August 9, 1991, the State of Alabama filed a motion for rehearing. In this motion, the Petitioner contended that Alabama's unique statutory scheme distinguished its death statute from the one present in Thompson v. Oklahoma, supra. On August 23, 1991, the Alabama Court of Criminal Appeals denied the Petitioner's application for rehearing. (Appendix B)

---

[2]487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

On September 13, 1991, the State of Alabama petitioned the Alabama Supreme Court for a writ of certiorari. That petition was denied on December 6, 1991. (Appendix C)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI AND OVERRULE THE HOLDING OF THE ALABAMA COURT OF CRIMINAL APPEALS WHICH DECIDED A SUBSTANTIAL FEDERAL QUESTION WHEN IT HELD THAT UNDER ALABAMA'S STATUTORY SCHEME A FIFTEEN YEAR OLD DEFENDANT COULD NOT RECEIVE THE DEATH PENALTY UNDER THOMPSON V. OKLAHOMA, 487 U.S. 815 (1988).

This Court should grant the Petitioner's petition for writ of certiorari because the Alabama Court of Criminal Appeals has decided a substantial federal question which needs to be, but has not yet been, addressed by this Honorable Court. In this case, the Alabama Court of Criminal Appeals held that Alabama's statutory scheme does not allow the imposition of the death penalty under Thompson v. Oklahoma, 487 U.S. 815 (1988).

This Court's decision in Thompson v. Oklahoma[3] was a plurality decision. As this Court stated in Gregg v. Georgia[4] with regard to the interpretation of a plurality opinion:

> "the holding of the Court may be viewed as that position taken by those members who concurred in the judgements on the narrowest grounds."

Thus, to find the holding of this Court in Thompson, one must look to the concurring opinion of Justice O'Conner.

Although Justice O'Conner stated that she believed "that a national consensus forbidding the execution of any person for a crime committed before the age of 16 existed," she was "reluctant to adopt this conclusion as a matter of constitutional law" at that time. She further stated:

> "Because I conclude that the sentence in this case can and should be set aside on narrower

---

[3]487 U.S. 815 (1988).

[4]428 U.S. 153, 169 n. 15 (1976).

> grounds than those adopted by the plurality and because the grounds on which I rest should allow us to face the more general question when better evidence is available, I concur only in the judgment of the Court."
>
> (101 L. Ed. 2d at 728).

Therefore, this decision rest on very narrow grounds.

The most pertinent portion of Justice O'Conner's opinion is as follows:

> "The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State [Oklahoma] has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility.

> Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

Thompson, 487 U.S. at ____, 108 S. Ct. at 2711.

The essence of Justice O'Conner's ruling is the lack of an explicit minimum age expressed in the Oklahoma statute. However, she also stated that if it were clear that no national consensus forbids the imposition of capital punishment before the age of 16, the

implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. The Petitioner recognizes the difficulty in establishing that such a national concensus exist. However, the Petitioner contends that a strong case can be made that a national consensus does exist as to the appropriateness of the death penalty for crimes of such a brutal and heinious nature as was committed in this instant case, notwithstanding the fact that the perpetrator of such a crime was fifteen years old at the time of the offense.

Justice O'Conner's main concern appears to be that the failure of an explicit minimum age in the statute would indicate a considerable risk that the legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility.

The Petitioner submits that the Alabama legislative scheme weighs against this conclusion. First, the Alabama legislative scheme allows a child over the age of 14 to be tried as an adult.[5] While the Petitioner is aware that the Oklahoma and Alabama statutes are similar, it is the contention of the Petitioner that the Alabama legislature has imputed knowledge of existing statutes. Therefore, it appears to the Petitioner as follows:

1. Alabama's legislature passed its capital statute with no reference to age.

2. At the time of the passage of said legislation Alabama law provided that any child over the age of 14 could be tried as an adult.

3. The Petitioner submits, that in light of this fact the Alabama legislature was aware that the minimum age for death eligibility was 14 years of age.

4. The Petitioner submits that if the Alabama legislature had not intended capital

---

[5]Title 12-15-34(a)(1), Code of Alabama (1975).

> punishment to be applied in appropriate circumstances to defendants under the age of 16, they would have expressly excluded that category.

Secondly, the Alabama statutory scheme mandates that the defendant's age is to be taken into consideration in determining whether capital punishment should be imposed.[6] The Petitioner submits that when both of these statutory elements are considered together there is no considerable risk that the legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question serious consideration.

In its opinion the Alabama Court of Criminal Appeals distinguished LeCroy v. Florida, 533 So. 2d 750, cert. denied, 109 S. Ct. 3262, cited by the District Attorney of Baldwin County, from the case at bar.

---

[6]Title 13A-5-51(7), Code of Alabama (1975).

Although the Petitioner concedes that the defendant in LeCroy was 17 years of age, the Petitioner submits that an examination of LeCroy is most helpful in evaluating Alabama's statutory scheme. The Petitioner contends that the age of the defendant in LeCroy[7] is the only distinguishing element from this instant case.

The Florida Supreme court distinguished Thompson[8] on four separate grounds:

1. The age of the defendant.

2. A Florida statute provides that a child of any age indicted for a crime punishable by death or life imprisonment "shall be tried and handled in every respect as if he were an adult." LeCroy, 533 So. 2d at 758.

3. "Point two is reinforced by the Florida legislature's decision that age should be a statutory mitigating factor," and

4. The trial judge in sentencing the defendant considered his age but found him mentally and

---

[7]533 So.2d 705, cert. denied, 109 S.Ct. 3362.

[8]487 U.S. 815 (1988).

> emotionally mature and this was consistent with the jury's recommendation of death.

In this present case Alabama law provides that every child over the age of 14 who is indicted for any felony shall be treated as an adult. This point is reinforced by the Alabama legislature's decision to make a defendant's age a mitigating factor under its capital statute. Finally, although the jury returned a verdict of life without parole, the trial judge considered the Appellant's age as a mitigating factor but found that the aggravating factors in the case outweighed such mitigation. Further, the State submits that the fact that the Florida statute allows a child of any age to be prosecuted in a capital case, should be evidence that there is no national consensus forbidding the imposition of the death penalty in regards to 15 year old defendants.

Lastly, the Petitioner would note the case of Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

Once again there is a plurality opinion. Justice O'Conner once again wrote a concurring opinion. She stated that although there was no minimum age provided in the statute, she reiterated her position that such a fact presented no constitutional problem where it was sufficiently clear that no national consensus would forbid such an application of capital punishment. She concluded that it was clear that no such national consensus existed in regard to 16 year old defendants and concurred with the judgment of the Court.

The Petitioner submits that Thompson v. Oklahoma was decided on very narrow grounds. As Justice O'Conner noted the case was not closed but deffered to "---allow us to face the more general question when better evidence is available---." Additionally, the Petitioner submits that Thompson v. Oklahoma, supra, did not take into account the total statutory scheme found in Alabama. The Petitioner contends that the concurrence of a statute providing that children over 14 may be

tried as adults and the legislative mandate that a defendant's age is a mitigating factor removes the concern expressed by Justice O'Conner regarding the Oklahoma statute.

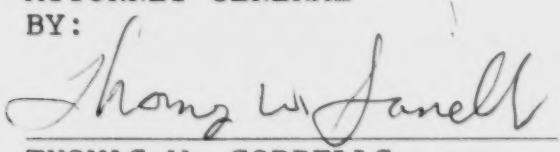
Therefore, this Honorable Court should overrule the decision of the Honorable Court of Criminal Appeals.

CONCLUSION

For the reasons stated above, this Court should grant certiorari to decide the substantial federal question presented in this case.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:



THOMAS W. SORRELLS
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY FOR THE
28TH JUDICIAL CIRCUIT OF
ALABAMA

4623I

(2)

91-1383

NO. _____

Supreme Court, U.S.
FEB 26 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

CLAYTON JOEL FLOWERS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDIX TO THE PETITION

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

*THOMAS W. SORRELLS
ASSISTANT ALABAMA ATTORNEY GENERAL

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY FOR THE
28TH JUDICIAL CIRCUIT
OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Attorney of Record

TABLE OF APPENDICIES

	PAGE
APPENDIX A, OPINION OF COURT OF CRIMINAL APPEALS.....	1
APPENDIX B, ALABAMA COURT OF CRIMINAL APPEALS' DENIAL OF PETITIONER'S APPLICATION FOR REHEARING.....	50
APPENDIX C, ALABAMA SUPREME COURT'S DENIAL OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI.	51

APPENDIX A

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-89-149

Clayton Joel Flowers

v.

State

Appeal from Baldwin Circuit Court
(CC-89-65)

TYSON, JUDGE

Clayton Joel Flowers, the appellant, was indicted for the capital murder of Karen Rolin. Specifically, the appellant was charged with intentional murder during the course of sodomy, in violation of §13A-5-40(a)(3), Code of Alabama 1975. The jury found the appellant guilty as charged in the indictment. At the sentencing phase of the trial, the jury, by a vote of 11 to 1, recommended that the appellant be sentenced to life imprisonment without parole. The trial judge rejected that jury's recommendation and

sentenced the appellant to death. The appellant was 15 years of age at the time this offense was committed.

At approximately 1:00 a.m. on the morning of June 5, 1990, Melissa Stone saw Karen Rolin at the Delchamps grocery store in Bay Minette with two young boys. Later that morning, the body of Karen Rolin was found floating under the Hollinger Creek Road bridge in Baldwin County, Alabama. A tire tool and a tire jack were found near the body. There was blood on the bridge and on the guard rail of the bridge. That same morning, the victim's car was found some distance away in Forest Park Lake.

The appellant gave two statements regarding the victim's death, the first to the Bay Minette Police Department and the second to the Baldwin County Sheriff's Department. The following is a summary of those statements. In the early morning hours of June 5, 1990, the appellant and Bill Caraway

were at Raymond White's house when the victim picked them up. The three went to Delchamps, where the victim attempted to cash her paycheck and then they got some gasoline. At this point, Caraway was driving, and he drove to Pine Grove Middle School. There, the victim said she wanted to have sex with the appellant, and they did. The appellant said the he used a condom. Afterwards, Caraway wanted to have sex with her. At this point, they all got out of the car and the appellant sat on the trunk of the car. The victim performed oral sex on the appellant while Caraway had anal intercourse with her. The appellant said that he had anal intercourse with the victim also. They then got back into the car and Caraway drove to Hollinger Creek Road bridge where Caraway got out of the car and told the appellant to get out. Caraway told the appellant that he wanted to "shut her mouth." Caraway then went and opened the trunk and told the victim to get out of the car.

The appellant told Caraway that he did not want to be involved, and he got back in the car. Caraway began hitting the victim with his fists and a tire tool and then he told the appellant to get out of the car. When the appellant got out, Caraway handed him the tire tool and told him to hit the victim. The appellant threw down the tire tool. Then Caraway handed the appellant a tire jack, and the appellant hit the victim with it one time, but he thought that she was already dead. Caraway and the appellant then dragged the victim across the bridge and threw her body into the creek. Caraway and the appellant drove to Forest Park Lake. Caraway wedged a stick against the accelerator of the victim's car, and the car went into the lake. Caraway and the appellant then went to White's house and White took him home.

Dr. Leroy Riddick performed the autopsy on the victim's body. The autopsy revealed numerous lacerations to the head and face,

multiple fractures to the skull, and defensive wounds to the arms. Dr. Riddick testified that the victim died of multiple blunt force injuries to the head and that those injuries could have been caused by a tire jack. The autopsy also revealed the presence of six tears around the anus and that semen was present in the anus. Riddick stated that the tears to the anus would have been painful.

Forensic tests showed that blood found on the victim's car was the same type as the victim's blood. A footprint impression taken near a pool of blood on the bridge matched the shoeprint of one of the appellant's shoes. Vaginal swabs taken from the victim were negative for the presence of seminal fluid but anal swabs taken from the victim were positive for the presence of seminal fluid. No semen was found in a condom which was found in the victim's car. Twelve of the victim's finger prints or palm prints were found on the top of the trunk of her car. Thirteen of the

appellant's finger prints and palm prints were found on various places inside and outside of the victim's car. Two of the appellant's palm prints were found overlapping two of the victim's palm prints on the trunk. The palm prints of the appellant and the victim were facing different directions. The appellant's and the victim's palm prints were also found on the driver's window.

The appellant's testimony at trial differed somewhat from his statements which were given to the police. The appellant testified that after he and the victim had had consensual sex at the Pine Grove Middle School, Caraway got in the backseat with the victim and the appellant took a walk. A while later, Caraway called him back to the car. The victim seemed upset and Caraway was mad. Caraway then drove to Hollinger Creek Road bridge where he stopped and told the appellant that he needed to talk to him outside of the car. The appellant got out of the car and

Caraway opened the trunk and said "We need to make sure she don't say anything" because "she wouldn't give it to me, so I took it." The appellant replied that he "wasn't going to have no part of this." Caraway told the victim to get out of the car, and the appellant got back into the car and listened to the radio. A few minutes later, Caraway told the appellant to get out of the car. When he did, the appellant saw the victim lying on the ground and saw Caraway with a tire tool in his hand. Caraway handed him the tire tool and told the appellant to hit the victim. The appellant threw it down. Caraway then handed the appellant the tire jack and said, "Hit her with this or I will hit you with it." The appellant then threw the jack down and he vomited. He doesn't remember whether he hit the victim with the jack. The appellant heard a splash and then heard the trunk close. He and Caraway got back in the car and drove to Forest Park Lake. The appellant got out of

the car and started walking. He heard the sound of a motor and a splash. The appellant and Caraway then returned to White's house.

I

The appellant contends that his statements to the police should have been suppressed for several reasons. The following testimony was taken at the suppression hearing.

Larry Durant and Alec McDowell, the assistant police chief and the police chief of the Bay Minette Police Department, took the first statement from the appellant. They testified that the appellant voluntarily came to the police station with his stepfather, Harold Eliott, after McDowell had contacted the appellant's family and told them that he needed to talk to the appellant about the murder of Karen Rolin. When the appellant arrived at the station, Durant advised the appellant of his Miranda rights and his right to have a parent present while he was

questioned. At this point, the appellant stated that he wanted his stepfather there with him. Eliott said that his wife, the appellant's mother, was too upset to be there and that she wanted him there. Eliott was with the appellant during the interrogation. At some point during the interrogation, the appellant's father, Ronald Flowers, came to the police station. Durant asked the appellant if he wanted his father present and the appellant said that he did not. Durant and McDowell stated that the appellant voluntarily made the statement and that no threats, no inducements, or no promises were made to the appellant and no hopes of reward offered in order to obtain his statement. The appellant did not appear to be under the influence of drugs or alcohol at the time he made his statement. Although the appellant was upset and crying, he appeared to understand what was happening and he could communicate with the officers.

Investigators Ronald Everts and Richard Bryars of the Baldwin County Sheriff's Department took the second statement from the appellant. Everts advised the appellants of his rights by reading from a juvenile waiver form. They testified that no threats, no inducements, or no promises were made to the appellant and no hopes of reward were offered and that he voluntarily gave them a statement. The appellant was told he could have either one or both of his parents present. The appellant said he didn't want to see his natural father. The appellant never asked to see his natural parents or a lawyer. Bryars stated that no one prevented the natural parents from seeing the appellant.

Ronald Flowers, the appellant's natural father, testified that the appellant's brother informed him that the police were interrogating the appellant, although he knew the day before that the appellant was going to talk to the police. He went to the police

station and asked to see the appellant. Durant told him "It's no use you going in there and seeing him because he is still in there being interrogated." Flowers did not see the appellant until after the interrogation. Flowers stated that his wife had custody of the appellant and that he knew that the appellant's stepfather, Eliott, went with the appellant to the police station. Flowers testified that he would have hired an attorney if he had been with the appellant during questioning.

Marilyn Flowers, the appellant's natural mother, testified that her husband, Harold Eliott, went with the appellant to the police station and that she thought that Eliott was going to call Ronald Flowers to come to the station also. She stated that Eliott had had some beers prior to going to the station. She and Eliott have divorced since that time. She stated that all decisions pertaining to the appellant were

made solely by her and Ronald Flowers and that Eliott was not responsible enough to make any decisions concerning the appellant. She stated that she knew the appellant was being questioned concerning the night Rolin was killed but that she didn't know how serious the situation was and, if she had, she would have been there with the appellant during questioning.

A

The appellant asserts that he was not properly advised of his rights and, therefore, he could not appreciate the consequences of waiving those rights. Rule 11(A), A.R.Juv.P., provides:

> "(A) When the child is taken into custody, he must be informed of the following rights by the person taking him into custody:
>
> "(1) That he has the right to counsel;
>
> "(2) That if he is unable to pay a lawyer and if his parents or guardian have not provided a lawyer, one can be provided at no charge;

"(3) That he is not required to say anything and that anything he says may be used against him; and
"(4) If his counsel, parent, or guardian is not present, that he has a right to communicate with them, and that, if necessary, reasonable means will be provided for him to do so."

Officer Durant testified that before he took the first statement from the appellant, he informed the appellant of his Miranda rights[1] and his right to have a parent present during questioning.[2] Durant said that he read the Miranda warnings from a standard Miranda form. Kinder v. State, 515 So. 2d 55, 68 (Ala. Crim. App. 1986), cert.

---

[1]"Rule 11(A)(1), (2). and (3) taken together, are substantially the same as the warnings required in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." Kinder v. State, 515 So. 2d 55, 68 (Ala. Crim. App. 1986), cert. denied (Ala. 1987) (quoting Ex Parte Whisenant, 466 So. 2d 1006, 1007 (Ala. 1985).

[2]"Rule 11(A) does not require that a juvenile be informed that has the right to have a parent or guardian present, but only that he has the right to communicate with them." Baker v. State, 450 So. 2d 470, 471 (Ala. Crim. App. 1984).

denied (Ala. 1987) (quoting Ex Parte Whisenant, 466 So. 2d 1006, 1007 (Ala. Crim. App. 1985)). The tape-recorded statement which was made to Durant and McDowell also indicates that the appellant was informed of his rights. Officer Everts testified that he informed the appellant of his rights by reading from a juvenile waiver form. The tape recording of the appellant's second statement clearly shows that the appellant was informed of his rights. The appellant seems to argue that the fact that the police could not find either one of the waiver forms that the appellant signed indicates either that the waivers were never executed or that the appellant did not knowingly waive his rights. This contention is meritless. The tape recordings reveal that the appellant clearly knew that he was waiving his rights and show that he had signed a waiver which was witnessed by the officers and by Eliott. Furthermore, the appellant stated on the tape

that he made the statements "of his own free will" and that he had returned to Alabama from Georgia (where he was living with his mother and Eliott) to "turn himself in." The fact that the waiver forms were lost between the time they were executed and the trial date is not determinative of whether the appellant knowingly waived his rights, because in many instances the waiver forms are not introduced into evidence or the accused refuses to sign a waiver form. See Chambers v. State, 497 So. 2d 607 (Ala. Crim. App. 1986); Player v. State, 421 So. 2d 1338 (Ala. Crim. App.), cert. denied (Ala. 1982); Proctor v. State, 391 So. 2d 1092 (Ala. Crim. App. 1980).

B

The appellant also contends that his waiver was not made knowingly and intelligently because he was not informed that he was going to be charged with an offense in this case or that if he was going to be

charged, that he would be charged with a capital offense and that he could face the death penalty. This argument is without merit. There was testimony taken at the suppression hearing that the officers informed the appellant that he was being questioned about the murder of Karen Rolin before the appellant made each statement. The tape-recorded statements support this testimony. Furthermore, the appellant stated that he came to the police station to "turn himself in." Clearly, this statement indicates that the appellant knew that he was going to be charged in connection with this offense when he came to the police station.

We know of no requirement that a suspect must be informed of all the offenses with which he could be charged and the particular punishments he could receive before he makes a statement. This is particularly true because in most instances the officers may not know what the offender will be charged

with until after the suspect has made his statement. In this case, Chief McDowell specifically testified that he did not know that he was going to charge the appellant with capital murder until after the appellant had made his statement. Furthermore, telling a suspect that he is going to be charged with a capital offense and that he could receive the death penalty could be perceived as coercive in a particular situation. See Stewart v. State, 562 So. 2d 1365 (Ala. Crim. App. 1989).

C

The appellant contends that his waiver of his rights was not voluntarily made because neither of his parents were present during questioning and because his stepfather, who was present, does not qualify as a parent or guardian under Rule 11(A)(4). First of all, as we have stated, Rule 11(a)(4) does not require that a parent be present during the questioning of a juvenile. All that is

required is that the juvenile be informed that he has the right to communicate with a parent and that he be allowed to communicate with that parent if he so chooses. Payne v. State, 487 So. 2d 256 (Ala. Crim. App. 1986); Baker v. State, 487 So. 2d 264 (Ala. Crim. App. 1986). "We know of no absolute requirement which necessitates the presence of a parent or other interested adult in order for a juvenile to make an effective waiver." Baker v. State, 450 So. 2d 470, 471 (Ala. Crim. App. 1984). Thus, we need not address whether Eliott qualified as a parent or guardian in this particular situation because the appellant had no right to have a parent present and because he never asked to communicate with his parents.

Second, even if there was a right to have a parent present during the questioning of a juvenile, the right would belong to the juvenile, not the parent. See Bombailey v. State, [Ms. 89- 1177, November 30, 1990], ___ So. 2d ___ (Ala. Crim. App. 1990). Here, the

appellant was told that he could have either or both of his parents present with him. The appellant told the officers that his mother was too upset to be present and that he did not want his father to be present but he said that he wanted his stepfather to be present, which the officers allowed. The officers testified that they never prohibited the appellant from seeing his parents and that the appellant never asked to see either of his natural parents or a lawyer. See M.B.M. v. State, 563 So. 2d 5 (Ala. Crim. App. 1989). The fact that the appellant's parents, in hindsight, wished that they had been present during the questioning of the appellant does not confer upon them a right that does not exist.

D

The appellant contends that it was error to allow officers Durant and Everts to read the appellant's rights from a standard

form at trial because the form from which they read was not the same form that the officers used when they read the appellant his rights before he gave his statements. Officer Durant testified that the form from which he read the Miranda rights at trial was a copy of the same form containing the Miranda rights which the Bay Minette Police Department uses everyday and that this form contained the exact same rights as those he read to the appellant. He stated that he never recites the Miranda rights "off the top of his head" and that he always reads from this form or a copy thereof because to do so is standard police procedure. Officer Everts testified that he read the appellant his rights from a form, which is the standard state form, that was provided to him by the juvenile officers in Baldwin County and which is the form that is utilized in Baldwin County. He testified that although it was not the form from which he read the appellant his rights, it was an exact

copy. The forms from which the officers read the rights they gave to the appellant were not introduced into evidence. We find no error in allowing these officers to read the rights they gave the appellant from a standard form when they both testified that the forms from which they read at trial and the forms from which they read the appellant his rights were the same. "'Reviewing courts therefore need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably "convey[y] to [a suspect] his rights as required by Miranda."'" M.B.M, 563 So. 2d at 8 (quoting Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989)). The warnings that these officers testified that they gave to the appellant reasonably conveyed to the appellant his rights as required by Miranda and Rule 11(A), A.R.Juv.P.

> "It is well settled in this state that an extrajudicial statement is presumed to be involuntary and is inadmissible at

trial unless the State presents sufficient evidence to show that the statement was in fact voluntary and that the proper Miranda warnings were given. Ex parte Johnson, 522 So.2d 234 (Ala.1988); Crowe v. State, 485 So.2d 351 (Ala.Cr.App.1984), reversed on other grounds, 485 So.2d 373 (Ala.1985). When the State seeks the admission of the statement of a juvenile, the State must show that the juvenile was advised of his rights under Rule 11(A), A.R.Juv.P., rather than the standard Miranda rights of which adults are advised. See Ex parte Whisenant, 466 So.2d 1006 (Ala.1985); Scott v. State, 501 So.2d 1273 (Ala Cr.App. 1986). Rule 11(A) contains the basic Miranda warnings, plus the additional information that the juvenile has the 'right to communicate with [his counsel, parent, or guardian if they are not present], and that if necessary, reasonable means will be provided for him to do so." Rule 11(A)(4), A.R.Juv.P. See Ex parte Whisenant, supra.

"Due process requires the trial court to hear evidence outside the presence of the jury in order to determine whether the statement or confession was, in fact, voluntarily made. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Miller v. Dugger, 838 F.2d 1530 (11th Cir.), cert. denied ___ U.S. ___, 108 S.Ct. 2832, 100 L.Ed.2d 933 (1988). This

determination is to be made based upon a consideration of the 'totality of the circumstances.' Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 280, 4 L.Ed.2d 242, 248 (1960); Myers v. State, 431 So.2d 1342, 1345 (Ala.Cr.App.1982), writ quashed, 431 So.2d 1346 (Ala.1983).

"The United States Supreme Court has specifically held that the 'totality of the circumstances' test is applicable when determining the admissibility of a juvenile's confession:

> "'This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits--indeed it mandates--inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.'

> "Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979) (quoted in Chambers v. State, 497 So.2d 607, 609-10 (Ala.Cr.App.1986)); Jackson v. State, 516 So.2d 726, 745 (Ala.Cr.App.1985)). See also Scott v. State, 501 So.2d at 1274; Whisenant v. State, 466 So.2d 995, 1000 (Ala.Cr.App.1984), reversed on other grounds, 466 So.2d 1006 (Ala.1985)."

Carr v. State, 545 So. 2d 820, 822 (Ala. Crim. App. 1989). The state showed that the appellant was advised of his Miranda rights and of those guaranteed by Rule 11(A), A.R.Juv.P., and it presented evidence that the appellant's statements were made voluntarily, after a knowing waiver of his rights. Thus, it is clear from our consideration of the "totality of the circumstances," including the appellant's age (15 years old) and educational level (completed ninth grade), that the trial court's finding that the appellant's statements were voluntarily made is fully supported by the evidence.

II

During his oral charge to the jury, the judge instructed the jury on the capital offense of intentional murder during the course of sodomy and on the lesser included offenses of intentional murder and sodomy. The appellant seems to argue that the trial judge should have instructed the jury that they could find the appellant guilty of murder and sodomy without necessarily finding him guilty of a capital offense. This argument is without merit. Under the facts of this case, if the jury found that the appellant committed the murder and the sodomy, the appellant is guilty of the capital offense of intentional murder during the course of sodomy and not of two separate offenses. The events which constituted this offense were part of one continuous transaction. Although there is some doubt as to whether the sodomy occurred at the Pine Grove School or at the Hollinger Creek Road bridge, there is no doubt that the

victim was killed because she had been sodomized and because the appellant and Caraway wanted to make sure that she did not go to the police. The capital offense of murder during the course of sodomy occurs when it is shown that the murder was committed "in the course of or in connection with the commission of, or in immediate flight from the commission of" a sodomy (13A-5-39(2). Code of Alabama). See Bradley v. State, 494 So. 2d 750 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986), aff'd, 494 So. 2d 772 (Ala. 1986), cert. denied, 480 U.S. 923, 107 S.Ct. 1385, 94 L.Ed.2d 699 (1987). Certainly, the facts of this case indicate that the murder occurred in connection with the commission of the sodomy. The crime began with the sodomy, and it was consummated when the victim was killed. See generally Connolly v. State, 500 So. 2d 57 (Ala. Crim. App. 1985), aff'd, 500 So. 2d 68 (Ala. 1986); Hallford v. State, 548 So. 2d 526 (Ala. Crim. App. 1988), aff'd, 548

So. 2d 547 (Ala. 1989), cert. denied. ___ U.S. ___, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989). Thus, there was no proof that two separate offenses, unrelated to each other, occurred here. The trial judge properly instructed the jury on the offenses in question and did not err by failing to give the additional instruction requested by defense counsel.

III

During the presentation of the appellant's defense, defense counsel sought to admit the testimony of Rayford Mitchell, an inmate in the Baldwin County jail. Mitchell would have testified that Bill Caraway told him that the appellant had sex with the victim. Caraway then said that he wanted to have sex with the victim and that she refused. Caraway stated that he tried to force the victim to have sex with him and that when she refused and started screaming, he hit

her with a jack and had sex with her after she was dead. Caraway also told Mitchell that he had run over the victim with the car. The trial judge refused to allow Mitchell's testimony because it constituted inadmissible hearsay. The appellant contends this refusal was error.

> "As a general rule, an accused may introduce any legal evidence that tends to show that someone else committed the crime for which he is charged. Green v. State, 258 Ala. 471, 64 So.2d 84 (1953). See generally C. Gamble, McElroy's Alabama Evidence, 48.01(1) (3rd ed. 1977); Schroeder, Hoffman and Thigpen, Alabama Evidence, §4-4(a)(c) (1987).
>
> "However, hearsay evidence is not legal evidence and is not admissible to show that someone other than the accused committed the offense at issue. Houston v. State, 208 Ala. 660, 95 So. 145 (1923). See also McDonald v. State, 241 Ala. 172, 1 So.2d 658 (1941); Morris v. State, 25 Ala.App. 175, 142 So. 685 (1932)."

Thomas v. State, 539 So. 2d 375, 395 (Ala. Crim. App.), aff'd, 539 So. 2d 399 (Ala. 1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989).

The appellant concedes that Mitchell's testimony was hearsay evidence, but he argues that this evidence should have been admitted under the declaration against interest exception to the hearsay rule. The traditional rule in Alabama has been that

> "In a criminal action, the declaration of a person, since deceased that he committed the crime for which the accused is being tried, is not admissible under the hearsay exception for declarations against pecuniary or proprietary interest and this is true regardless of the fact that the declaration also tended to subject the declarant to civil liability in tort."

C. Gamble, McElroy's Alabama Evidence, 249.02(1) (4th ed. 1991) (citing Wesson v. State, 238 Ala. 399, 191 So. 249 (1939)); Wells v. State, 21 Ala. App. 217, 107 So. 31 (1926); Spicer v. State, 198 Ala. 13, 73 So. 396 (1916); West v. State, 76 Ala. 98 (1884). This court's holding in Lundy v. State, 539 So. 2d 324 (Ala. Crim. App. 1988), cert. denied (Ala. 1989), appears to have modified the rule as set out above. In Lundy, this

court implicitly held that the person did not have to be deceased but merely unavailable and explicitly held that the hearsay declarant in that case was unavailable because he would have refused to testify by asserting his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The appellant alleges that the hearsay declarant in this case, Caraway, would have invoked his Fifth Amendment privilege and, thus, would have been unavailable. We agree that under the reasoning of Lundy, Caraway was an unavailable witness.[3]

However, we do not believe that Lundy modified the basic rule that the declaration of a person, who is now unavailable, that he

---

[3]However, there would have had to have been evidence that Caraway would have invoked the Fifth Amendment to show his actual unavailability. In Lundy, the court contacted the hearsay declarant's attorney. The attorney told the court that, if his client was called to testify, the client would assert his Fifth Amendment privilege against self-incrimination.

committed the offense for which the defendant is being tried, is not admissible under the hearsay exception in question. In Lundy, the defendant was charged with the capital murder of his wife. The state's evidence tended to show that he hired Rex Goodson to run over his wife with his truck and kill her and that Goodson did so. During the state's case in chief, Rex Goodson's uncle was allowed to testify that Rex came to his house shortly after the collision that killed the defendant's wife and said, "I have run over somebody. I don't know how badly they are hurt and I want to call the police." Lundy, 539 So. 2d at 329. Defense counsel objected to the admission of this evidence as hearsay. On appeal, this court stated that although the statement was hearsay, the statement was an admission against interest and was properly admitted as an exception to the hearsay rule. The reason this court found that the statement was properly admitted as a declaration against

interest is because the statement was "an admission to being involved in an accident" not "an admission to a crime." Lundy, 539 So. 2d at 330. Here, Caraway's statement to Mitchell was an admission to a crime, i.e., the crime for which the appellant was being tried and, thus, it is not admissible under the hearsay exception for declarations against pecuniary or proprietary interest.

In Lundy, 539 So. 2d at 330, we stated:

> "Rule 804(b)(3) of the Federal Rules of Evidence provides that a statement against interest is admissible when the declarant is unavailable. This includes statements that would subject the declarant to either criminal or civil liability, if a reasonable person in that position would not have made that statement, had they not believed it to be true."

Although we made reference to this federal rule in Lundy, we did not overrule the existing law and adopt the federal rule as law. While an increasing number of jurisdictions, like the federal courts, are allowing extrajudicial declarations of a

criminal act to be admitted into evidence in a criminal trial, Annot., 92 A.L.R. 3d 1164 (1979), we do not find this to be the rule of law in this state at this time.

The appellant also argues that Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), is controlling in this case. In Thomas, this court addressed this very issue in a similar fact situation to the one at bar and distinguished Chambers. We find that the rationale expressed in Thomas also applies to distinguish the present case from Chambers. Furthermore, we believe that the reasoning from the following Mississippi case addressing this issue is relevant:

> "In Chambers, one McDonald had confessed to several persons that he and not Chambers killed the deceased. McDonald thereafter repudiated his confessions but was present when Chambers was tried. Chambers held that proof of McDonald's confession was admissible and the case was reversed because this testimony had been excluded.
>
> "The Mississippi rule regarding the inadmissibility of declarations against penal

> interest where the declarant is not available as a witness was announced in Brown v. State, 99 Miss. 719, 55 So. 961 (1911). Brown was not overruled in Chambers, for in the latter opinion the Court noted that ' . . . we need not decide in this case, whether, under other circumstances, it might serve some valid state purpose by excluding untrustworthy testimony.' 410 U.S. at 300, 93 S.Ct. at 1048. And in Chambers, the Court said that 'the availability of McDonald [the declarant] significantly distinguishes this case from prior Mississippi precedent, Brown v. State, supra. . . .' 410 U. S. at 301, 93 S.Ct. at 1049.
>
> "We hold, therefore, that the validity of the rule announced in Brown was not undermined by the Chambers opinion, and where the declarant is not available, his out-of- court declarations against penal interest are not sufficiently trustworthy to justify the Court in making an exception to the hearsay rule."

Thompson v. State, 309 So. 2d 533 (Miss. 1975), cert. denied, 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 250 (1975).

Likewise, we find that our present rule, which forbids the admission into evidence at a criminal trial of a declaration

by an unavailable declarant that he committed the crime for which the defendant is being tried, was not overruled by Chambers, and the out-of-court statement made by Caraway to Mitchell was illegal hearsay evidence.

Furthermore, even had this evidence been legal, we would still conclude that it was properly excluded. While it is proper to present legal evidence to show that someone else committed the offense for which the accused is charged, that evidence, to be admissible, must be inconsistent with the guilt of the accused. Thomas. Here, the evidence sought to be introduced by the appellant was not inconsistent with the appellant's guilt of the charged offense. This evidence only showed that someone else, Caraway, may also have been guilty of the charged offense. There is no error here.

IV

The appellant contends that the trial court erred by refusing defense counsel's "request that special interrogatories be sent to the jury for the purpose of aiding the jury in its deliberations." (Appellant's brief (Pennington). p. 24.) Section 12-16-14, Code of Alabama 1975, provides: "All instruments of evidence and depositions read to the jury may be taken out by them on their retirement." See also Rule 22.1, A.R.Crim.P; C. Gamble, McElroy's Alabama Evidence, §10.04 (4th ed. 1991). Rule 14, A.R.Crim.P.Temp., allows the court, in its discretion, to submit the charge against the defendant and the "given" written instructions to the jury in a complex case. See also Rule 21.1, A.R.Crim.P. We can find no authority in Alabama nor has the appellant cited us to any authority which requires or allows the submission of special interrogatories to the jury during its deliberations. Thus, this argument is without merit.

V

The appellant argues, and the attorney general concedes, that the appellant's sentence of death must be vacated. In Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), a plurality of the United States Supreme Court held that it would violate the Eighth Amendment to execute a defendant who was under the age of 16 at the time the offense was committed.[4] The plurality opinion was authored by Justice Stevens and concurred in by Justices Brennan, Blackmun, and Marshall. Justice O'Connor concurred in the judgment and wrote a concurring opinion. Justice Scalia wrote a dissenting opinion, which was joined by Chief Justice Rehnquist and Justice White. Justice Kennedy did not participate in the opinion. With regard to the interpretation of a

---

[4]The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment."

plurality opinion, the Supreme Court has stated that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Green v. Georgia, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 85g, 872 n. 15 (1976). Thus, we need to look to Justice O'Connor's opinion to determine the exact holding of the Supreme Court. In her opinion, Justice O'Connor stated that the plurality and dissent agree on two things: "that there is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the '"'evolving standards of decency that mark the progress of a maturing society.'"'" Thompson, 487 U.S. at ___, 108 S.Ct. at 2706. Justice O'Connor went on to say that although she believed "that a national consensus forbidding the execution of any person for a crime committed before the

age of 16 very likely does exist," she was "reluctant to adopt this conclusion as a matter of constitutional law" at that time. Because of this, Justice O'Connor was unwilling to decide whether the execution of those under age 16 violates the Eighth Amendment. However, Justice O'Connor concurred in the plurality's decision that Thompson's death sentence should be vacated because Oklahoma's capital offense statute did not set a minimum age below which the death penalty could not be imposed upon a person convicted of a capital offense.

> "The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State [Oklahoma] has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the

> Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."

Thompson, 487 U.S. at ___, 108 S.Ct. at 2711.

The facts of Thompson are indistinguishable from those before us. The appellant, like

Thompson, was 15 at the time he committed the capital offense. Alabama's death statute provides no minimum age below which the death penalty cannot be imposed upon a person. Further, Alabama 's statutory scheme, which allows a child over the age of 14 to be tried as an adult, is similar to the one that was in effect in Oklahoma at the time Thompson was decided. Thus, we must vacate the appellant's sentence of death.

An amicus brief was filed in this case by the district attorney of Baldwin County. In his brief, the district attorney asserts that the Supreme Court's decision in Thompson was reversed by that Court's ruling in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). We disagree and find that the facts presented in and the holding of Stanford are distinguishable from the case at bar. In Stanford, a plurality opinion, authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices White

and Kennedy, stated that the execution of a defendant who was 16 or 17 years Of age at the time of the commission of a capital offense does not violate "the Eighth Amendment's prohibition against cruel and unusual punishment." Stanford, ___ U.S. at ___, 109 S.Ct. at 2980. Justice Brennan wrote a dissenting opinion, which was joined in by Justices Stevens, Marshall, and Blackmun. Just as in Thompson. Justice O'Connor wrote a concurring opinion, which represents the holding of the court. In her opinion, Justice O'Connor explicitly distinguished her holding in Thompson from her holding in Stanford and stated:

> "Last Term, in Thompson v. Oklahoma, 487 U.S. ___, ___, 108 S.Ct. 2687, ___, 101 L.Ed.2d 702 (1988) (concurring in judgment), I expressed the view that a criminal defendant who would have been tried as a juvenile under state law, but for the granting of a petition waiving juvenile court jurisdiction, may only be executed for a capital offense if the State's capital punishment statute specifies a minimum age at which the commission of a capital crime

> can lead to an offender's execution and the defendant had reached that minimum age at the time the crime was committed. As a threshold matter, I indicated that such specificity is not necessary to avoid constitutional problems if it is clear that no national consensus forbids the imposition of capital punishment for crimes committed at such an age. Id. at ___, 108 S.Ct., at ___, Applying this two-part standard in Thompson. I concluded that Oklahoma's imposition of a death sentence on an individual who was 15 years old at the time he committed a capital offense should be set aside. Applying the same standard today, I conclude that the death sentences for capital murder imposed by Missouri and Kentucky on petitioners Wilkins and Stanford, respectively, should not be set aside because it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers."

Stanford, ___ U.S. at ___, 109 S.Ct. at 2981. We conclude that neither the plurality's nor Justice O'Connor's reasoning in Stanford affects this court's decision in the case at bar, because the appellant was 15 years of age at the time he committed the capital offense and the petitioners in Stanford were 16 and 17

years old at the time of their offenses. The district attorney of Baldwin County seems to argue that the court's holding in Thompson somehow has been explicitly overruled because since the time the case was decided, Justice Brennan has retired and has been replaced by Justice Souter. We disagree. The Supreme Court's opinion in Stanford did not overrule its previous holding in Thompson and, thus, Thompson remains the law of this land and is controlling upon this court. Further, the district attorney argues that Thompson should be distinguished from this case because he alleges that the Legislature intended that 15-year-olds should be subject to the death penalty because the Legislature provided that the appellant's age should be a mitigating factor in determining whether the death penalty should be imposed upon a particular defendant, and he cites us to a Florida case, LeCroy v. State, 533 So. 2d 750 (Fla. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3262,

106 L.Ed.2d 607 (1989). In LeCroy, a pre-Stanford case, the Florida Supreme Court distinguished Thompson on four different grounds: 1) the defendant in LeCroy was 17 years old at the time he committed the capital offense; 2) a Florida statute provides that a child of any age indicted for a crime punishable by death or life imprisonment "shall be tried and handled in every respect as if he were an adult," LeCroy, 533 So. 2d at 758 (quoting Fla. State. Ann. §39.02(5)(c)); 3) "point two is reinforced by the Florida Legislature's decision that age should be a statutory mitigating factor"; and 4) the trial judge in sentencing the defendant considered his age but found him to be mentally and emotionally mature and this was consistent with the jury's recommendation of death. We are unconvinced by the district attorney's argument based on LeCroy. First of all, the court in LeCroy specifically stated that it was limiting its holding to the particular

facts before it and it did not consider this case "to be a definitive resolution of whether there is some irreducible minimum age below which the death penalty may never be imposed." LeCroy, 533 So. 2d at 758. Second, while the court did say that the fact that the legislature included age as a statutory mitigating factor indicated that the legislature had considered that a "child" may be death-eligible, it specifically stated that this fact should be considered with the statute, which provides that a child of any age who is indicted for an offense punishable by death or life imprisonment shall be treated as an adult in every respect. Third, the main distinction between these two cases is the age of the two defendants. The appellant here was 15 years old and the defendant in LeCroy was 17 years old. The facts of Lecroy are more similar to Stanford than Thompson. While it is true that there was no provision under Oklahoma law that designated the defendant's

age as a mitigating factor at the time Thompson was decided, we are not convinced that the inclusion of such a provision in our death statute indicates that the Legislature specifically considered and intended that the death penalty should be imposed on 14- or 15-year-old capital defendants. Furthermore, courts of two other states, which also have provisions in their death statutes which provide that the defendant's age shall be a mitigating factor, have vacated the death sentences of 15-year-old capital defendants under Thompson.[5] See State v. Stone, 535 So. 2d 362 (La. 1988); Cooper v. State, 540 N.E.2d 1216 (Ind. 1989). Therefore, based on the reasons set out above, the appellant's sentence of death is vacated, because it violates the Eighth Amendment's prohibition against cruel and unusual punishment.

---

[5]We must note, however, that neither Of these Courts addressed the specific point raised by the district attorney of Baldwin County.

The appellant's other issue concerning the heinous, atrocious, and cruel aggravating circumstance is moot since the death penalty cannot be imposed in this case. Furthermore, during oral argument, the appellant asserted that the court's instructions to the jury on reasonable doubt during the guilt and sentencing phases of the trial were improper. No objection was made to these instructions during the trial, and the appellant did not assert this issue in his briefs to this court. During oral argument, this court granted the state's request to brief this issue. Although the state has filed a supplemental brief concerning this issue, the appellant has not filed a supplemental brief with this court with regard to this issue. An objection to the court's oral charge to the jury cannot be raised for the first time on appeal. Kyser v. State, 513 So. 2d 68 (Ala. Crim. App. 1987), Rule 14, A.R.Crim.P.Temp. Thus, we find that this issue has not been

preserved for review. We must also note that because the appellant cannot receive a death sentence in this case, we are not required to notice plain error in the record. Rule 45A, A.R.App.P.; Cook v. State, 384 So. 2d 1158 (Ala. Crim. App.), cert. denied, 384 So.2d 1161 (Ala. 1980); Eady v. State, 424 So.2d 694 (Ala. Crim. App. 1982).

The appellant's conviction of the capital offense is affirmed. The appellant's sentence of death is vacated and this cause is remanded to the trial court with instructions that the appellant be sentenced to life imprisonment without the possibility of parole.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

All the Judges concur.

APPENDIX B

Clayton Joel Flowers v. State, CR 89-149
Mobile Circuit Court (CC-89-65)

ON APPLICATION FOR REHEARING

TYSON, JUDGE

The Attorney General now argues in brief that the sentence of death imposed in this case should be upheld. This court adheres to its position as stated in its opinion. The state's motion under Rule 3g(k) is denied. Each of the appellant's motions under Rule 39(k) are denied. All three applications for rehearing are overruled.

OPINION EXTENDED; MOTIONS DENIED; APPLICATIONS OVERRULED.

All the Judges concur.

APPENDIX C

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 6, 1991

1901890

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Clayton Joel Flowers v. State)

(CCA 89-149 (Baldwin CC-89-65))

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PER CURIAM - HORNSBY, CJ., ALMON, SHORES, ADAMS, HOUSTON AND STEAGALL, JJ. CONCUR. MADDOX AND INGRAM, JJ., DISSENT

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

NO. 91-1383
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA, PETITIONER

V.

CLAYTON JOEL FLOWERS, RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* W. DONALD BOLTON, JR.
Post Office Box 259
Foley, Alabama 36536
205/943-3860

* THACK H. DYSON
Post Office Box 998
Foley, Alabama 36536
205/943-4040

* Attorneys of Record for Respondent Clayton Joel Flowers

TABLE OF CONTENTS

	Page
TABLE OF CASES	iii
TABLE OF OTHER AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CASES

	Page
Furman v. Georgia, 408 U.S. 238 (1972).	5,6
Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976).	3
Lakewood v. Plain Dealer, 486 U.S. 750, 764 n. 9 (1988).	3
Marks v. United States, 430 U.S. 188, 193 (1977).	3
Thompson v. Oklahoma, 108 S.Ct. 2687 (1988).	2,3,4, 5,6,7
Hubbard v. State, 290 Ala. 118, 119, 274 So.2d 298, 300 (1973).	6

TABLE OF OTHER AUTHORITIES

	Page
Alabama Code §12-15-34 (1975).	4
Alabama Code §§13A-5-39 through 13A-5-59 (1975).	4

STATEMENT OF THE CASE

Your respondent substantially accepts and adopts by reference the statement of the case submitted by the petitioner, with the exception of the following amendment.

On March 22, 1992 the respondent was granted an extension of time within which to file a response to the petition for writ of certiorari to and including April 17, 1992. The respondent also filed a motion for leave to proceed in forma pauperis on March 24, 1992.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE WRIT BECAUSE THE RULING FROM THE ALABAMA COURT OF CRIMINAL APPEALS IS CONSISTENT WITH THIS COURT'S PREVIOUS RULING IN THE CASE OF THOMPSON V. OKLAHOMA, 487 U.S. 815 (1988).

This Honorable Court should deny the petitioner's petition for writ of certiorari because the Alabama Court of Criminal Appeals has decided this question consistent with this Court's previous ruling in the case of Thompson v. Oklahoma, 108 S.Ct. 2687 (1988). Contrary to the petitioner's assertion, the Court of Criminal Appeals did not decide a substantial federal question which has not been previously addressed by this Honorable Court.

Your respondent was fifteen (15) years old at the time of the purported offense. The case in Thompson v. Oklahoma, supra, involved a fifteen (15) year old defendant who committed a capital offense which, like the one at bar, was found to be especially heinous, atrocious or cruel. Id at 2690. Like this appellant, the fifteen (15) year old defendant in Thompson was sentenced to death. This Honorable Court, on grounds that are inescapably applicable to the present case, vacated the death sentence in Thompson.

Four (4) members of this Court joined in a plurality opinion, holding that it was unconstitutional to impose a death sentence for a crime committed when the defendant was under sixteen (16) years of age regardless of the circumstances. 108 S.Ct. at 2689-2700 (opinion of Stevens, J., joined by Brennan, Marshall and Blackmun, J.J.). Justice O'Connor concurred in the judgment and wrote a separate opinion. Id at 2706-2711. There were

three (3) dissenters (Scalia, J., joined by Reinquist, C.J. and White, J.). Justice Kennedy did not take part in the decision.

Because Justice O'Connor's position is necessary to have a judgment supported by five (5) Justices, her opinion constitutes the holding. As this Court has previously explained:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of 5 Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . .' Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). . . .

Marks v. United States, 430 U.S. 188, 193 (1977); accord Lakewood v. Plain Dealer, 486 U.S. 750, 764 n. 9 (1988).

Therefore, this Court must look to Justice O'Connor's opinion, the narrowest ground of reversal in Thompson, for the rule of law it must apply.

Unlike the four-member plurality, Justice O'Connor did not conclude that the death penalty was unconstitutional in every circumstance involving a fifteen (15) year old murderer. She expressly declined to address that question, because she did not find it necessary to the resolution of the case. 108 S.Ct. at 2710. Instead, Justice O'Connor concluded that:

> The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The state has also, but quite separately, provided that 15 year old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15 year old defendants death-

> eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this court with the result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who are below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

Id, at 2710-2711 (emphasis added and footnote omitted).

Alabama's capital punishment statute, Alabama Code §§13A-5-39 through 13A-5-59 (1975), like Oklahoma's, does not specify a minimum age at which the commission of a capital crime can lead to the offender's execution. 108 S.Ct. at 2695 (plurality opinion) (specifically listing Alabama as such a state). It is true that Alabama has a statute specifying that juveniles, including fifteen (15) year olds, can be certified to stand trial as adults, and the respondent was certified to stand trial as an adult under that statute. Alabama Code §12-15-34 (1975). However, the defendant in Thompson was certified to stand trial as an adult under Oklahoma's statutes, a fact expressly recognized by every Justice who participated in the Thompson decision, including Justice O'Connor. Id at 2690 (plurality opinion); Id at 2710-2711 (O'Connor, J., concurring); Id at 2713 (dissenting opinion).

At the time of the Thompson decision, eighteen (18) states provided for capital punishment but only for defendants of some minimum age above fifteen (15) years old, and

nineteen (19) states provided capital punishment without specifying a minimum age. 108 S.Ct. at 2695-2696 & n. 29 (plurality opinion). In all nineteen (19) of those states, including Oklahoma and Alabama, a defendant who is fifteen (15) years old when he committed the capital offense could be certified to stand trial as an adult and could receive a death sentence through that procedure. Id at 2707 (concurring opinion of O'Connor, J.). It is to those nineteen (19) statutory systems, including the Oklahoma and Alabama statutes, that Justice O'Connor spoke. Because her opinion is the narrowest ground for the judgment in Thompson, it is the holding of this Court, as has been previously discussed. Under the Thompson holding, a defendant who is fifteen (15) at the time of the capital offense cannot be sentenced to death in a state whose capital punishment statute does not specify a minimum age below sixteen (16), even if the defendant was certified to stand trial as an adult under that state's laws. That holding inescapably applies to this case, just as it did to Thompson's case.

The Alabama Court of Criminal Appeals properly applied the Thompson decision by vacating the respondent's death sentence. It recognized the fact that United States Supreme Court decisions are binding upon it and ruled accordingly. An analogous situation arose in the wake of Furman v. Georgia, 408 U.S. 238 (1972), a five-to-four judgment in which there were nine separate opinions and no two (2) Justices could agree on the same opinion. Because Alabama was not a party to that case, Alabama's pre-Furman statute was not directly involved. Nevertheless, the Alabama Supreme Court held that:

> "There is no question that Furman has, as of now, eliminated the death penalty from our statute, §318, supra."

Hubbard v. State, 290 Ala. 118, 119, 274 So.2d 298, 300 (1973). The Alabama Supreme Court vacated death sentences in the wake of Furman, even though it had doubts about the wisdom of that decision:

> "Under the holding of the Federal Supreme Court in Furman, supra, which we are required to follow, the death penalty cannot be inflicted in the instant case. The permanency of the decision in Furman is doubtful but it must be here applied."

290 Ala. at 120; 274 So.2d at 301.

It is clear that the Alabama Court of Criminal Appeals properly interpreted the Thompson decision and applied it in its ruling.

Your respondent would be remiss if he did not point out to this Honorable Court that the original position taken by the State of Alabama in this case was that the trial court erred to reversal by sentencing the respondent to death. Shortly after sentencing, Honorable Ed Cairns, Assistant Alabama Attorney General, (now a nominee to the vacancy on the Eleventh Circuit Court of Appeals) wrote the Baldwin County, Alabama District Attorney a letter advising the District Attorney of the trial judge's error in sentencing. A copy of this February 26, 1990 letter is annexed hereto as Appendix A to this Brief in Opposition to the Petition for Writ of Certiorari. A flurry of correspondence was subsequently exchanged between the Office of the Alabama Attorney General and the Baldwin County, Alabama District Attorney's office. (This correspondence is likewise annexed hereto as Appendix B-F). It should also be observed that when this case was argued before the Alabama Court

of Criminal Appeals, the State of Alabama conceded the point that the imposition of the death sentence in this case was contrary to this Honorable Court's previous ruling in Thompson v. Oklahoma and that said sentence was due to be vacated. Honorable James H. Evans took office as the Alabama Attorney General shortly before oral arguments in this case before the Alabama Court of Criminal Appeals. Notwithstanding his office's previous position concerning the imposition of the death sentence in this case, Attorney General Evans later argued that the death sentence was properly imposed and that the ruling of the Court of Criminal Appeals should be reversed. Inasmuch as the petitioner's previous position was that the death sentence was due to be vacated, the State of Alabama has waived whatever right it possibly enjoyed in challenging the ruling of the Alabama Court of Criminal Appeals, and should not be permitted to complain about the State appellate court's ruling. Therefore, this Honorable Court should affirm the decision of the Alabama Court of Criminal Appeals and deny the writ.

CONCLUSION

For the reasons stated above, this Honorable Court should deny the writ of certiorari and affirm the decision from the appellate court below.

Respectfully submitted,

W. DONALD BOLTON, JR.
Post Office Box 259
Foley, Alabama 36536
205/943-3860

THACK H. DYSON
Post Office Box 998
Foley, Alabama 36536
205/943-4040

Attorneys of Record for Respondent
Clayton Joel Flowers

CERTIFICATE OF SERVICE

STATE OF ALABAMA	)	TO THE UNITED STATES
	)	SUPREME COURT
Petitioner,	)	
	)	NO. 91-1383
vs.	)	
	)	CIRCUIT COURT CASE
CLAYTON JOEL FLOWERS	)	NUMBER: CC-89-65
	)	
Respondent.	)	
	)	

I certify that I served this Reply Brief of Respondent on the Hon. James H. Evans, Attorney General, Hon. Thomas W. Sorrells, Assistant Attorney General, and Hon. John David Whetstone, District Attorney, by placing a copy in the United States mail, postage prepaid, and properly addressed as follows:

Hon. James H. Evans, Attorney General
11 South Union Street
Montgomery, Alabama 36130

Hon. Thomas W. Sorrells, Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130

Hon. John David Whetstone
Baldwin County, Alabama District Attorney
Post Office Box 58
Bay Minette, Alabama 36507

Done this 15th day of April, 1992.

THACK H. DYSON

OFFICE OF THE
ATTORNEY GENERAL
DON SIEGELMAN
ATTORNEY GENERAL
MONTGOMERY, ALABAMA 36130
(205) 261-7400

STATE OF ALABAMA

February 26, 1990

Honorable J. David Whetstone
Baldwin County District Attorney
Baldwin County Courthouse
Courthouse Square
Day Minette, Alabama 36507

Dear Dave:

I read in the weekend paper that a murderer named Clayton Joel Flowers had been sentenced to death in Baldwin County Circuit Court for a murder he committed when he was fifteen years of age.

Such a result is prohibited under Thompson v. Oklahoma, 108 S.Ct. 2687 (1988). In that case, four justices concluded that the Constitution prohibited the execution of anyone who committed his murder before reaching the age of sixteen. A fifth justice, Justice O'Connor, was necessary to the holding and her opinion defines it. She concurred in the result, vacating the death sentence imposed for a murder committed before the age of sixteen, because in her opinion the Constitution prohibits such a death sentence unless the capital punishment statute under which it was imposed expressly specifies that death is an available sentence for murders committed before the defendant reached age sixteen. 109 S.Ct. at 2711 ("petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.") (footnote omitted).

Under the Thompson decision, no one can be executed in Alabama for a crime committed before he reached age sixteen. It is true that other provisions of Alabama law provide that fifteen-year-olds can be certified for trial as adults, but that was true of Oklahoma law in the Thompson case, also. What is required is a specific provision in the capital punishment statute itself permitting execution for a crime committed before age sixteen. The death sentence in Thompson was vacated

because Oklahoma's capital punishment statute had no such provision. Alabama's capital punishment statute does not, either.

It will save some time, trouble, and embarrassment if you correct this error now. Otherwise, the Court of Criminal Appeals will have to do so in an opinion which, of course, will be permanently published.

Sincerely,

Ed Carnes
Assistant Attorney General

EC:sf
cc: Hon. James H. Reid
Hon. Al Pennington

1716t

OFFICE OF THE DISTRICT ATTORNEY

ROBERT E. WILTERS
CHIEF ASSISTANT DISTRICT ATTORNEY
LAURA DAHLE
ASSISTANT DISTRICT ATTORNEY
CHARLES KENNETH SLADE
ASSISTANT DISTRICT ATTORNEY

P.O. BOX 58
BAY MINETTE, AL 36507
(205) 937-0274

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY
TWENTY-EIGHTH JUDICIAL CIRCUIT

March 6, 1990

Honorable Ed Carnes
Assistant Attorney General
State of Alabama
State House
Montgomery, Alabama 36130

Dear Ed:

I have your letter of February 26, 1990, relative to the conviction of Clayton Joel Flowers who was sentenced to death in Baldwin County for a murder he committed when he was fifteen years of age.

I have read your letter, which I appreciate, but respectfully disagree with. I have read the decision of Thompson v. Oklahoma, and have reached the conclusion that four Justices voted one way, four Justices voted another, and Justice Sandra O'Connor took a third route. I am convinced that no case in Alabama has ruled whether or not, under Alabama scheme, Thompson v. Oklahoma, comes into play, or better yet, Justice O'Connor's singular decision in Thompson v. Oklahoma comes into play.

Since the vote was so close and there exists a possibility of a Justice change before this case reaches the United States Supreme Court, I believe the issue is still ripe and has not been finally decided in Alabama.

I would appreciate the Attorney General representing this matter on appeal so that we can get a Court decision in Alabama which clarifies this matter.

I appreciate your letter very much and the intent with which you forwarded it and hope that you understand my position.

I remain,

Very truly yours,

JOHN D. WHETSTONE
District Attorney

/kh
cc: Honorable James H. Reid
Honorable Al Pennington

OFFICE OF THE
ATTORNEY GENERAL
DON SIEGELMAN
ATTORNEY GENERAL
MONTGOMERY, ALABAMA 36130
(205) 261-7400

STATE OF ALABAMA

March 9, 1990

Honorable John David Whetstone
District Attorney
Post Office Box 58
Bay Minette, AL 36507

RE: State v. Clayton Joel Flowers

Dear Dave:

Thank you for your letter of March 6, 1990, and I appreciate the spirit in which it was written. I feel that I fully understand your position, and want to make sure that you understand my position, which is the position of the Capital Litigation Division of the Attorney General's Office.

It is true that the vote of the justices in Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), was close, but that does not make the decision any less the law. For example, on Tuesday of this week, the United States Supreme Court handed down four capital punishment decisions, from four different states, and three of those decisions resolved important issues in favor of the states. All three cases that our side won were decided by a 5 to 4 vote, but those three decisions are nonetheless the law of the land. I intend to use those three 5 to 4 decisions to the fullest in representing the State, just as I would if the vote had been 9 to 0. It simply is not true that decisions of the Supreme Court that are based on a close vote of the justices can be disregarded.

As you point out, the five justices who agreed in the result in Thompson did not join a single opinion. Four justices joined an opinion that said no one who was 15 years of age at the time he committed the murder could be sentenced to death under any circumstances. (Three justices dissented, and Justice Kennedy did not participate.) Justice O'Connor, who provided the fifth vote, wrote a separate opinion. Her opinion says that no state can impose a death sentence for a murder committed when the defendant was fifteen, unless that state's capital punishment statute expressly provides that it can be done. Oklahoma's capital punishment statute, like Alabama's,

does not contain such an express provision. Therefore, the result in Thompson was that the Supreme Court held that Oklahoma could not impose the death sentence on a murderer who was fifteen when he killed. Because Alabama's statute is materially identical to Oklahoma's on this point, the law stated in Thompson is the law that applies in Alabama. The statutes are the same regarding this point; the result is the same.

It simply is not true that a Supreme Court decision does not apply to other cases unless five or more justices join in a single opinion which puts forward a common rationale for the decision. As you will recall, the Furman v. Georgia, 408 U.S. 328 (1972), decision itself was based on nine separate opinions. Even though no two justices could agree on a common rationale in Furman, five of them agreed that the three statutes before them in that case were unconstitutional. Based on the Furman decision, every capital punishment statute in the country was invalidated, and that result followed even though Furman was a 5 to 4 decision with no majority opinion.

As you point out, "there exists a possibility of a Justice change before this case reaches the United States Supreme Court." That is always true, particularly with regard to close decisions. It was certainly true with Furman, and indeed there was some change in the membership of the Supreme Court soon after Furman. Nonetheless, Furman was, and still is, the law. One cannot violate the law laid down in Supreme Court decisions based upon the hope that by the time the violation reaches the Court it will have changed its collective mind. That is simply not the way our system of law and precedent works.

As you know, I have been representing the State in this area of the law for more than a decade. I have had a major role in the years of post-conviction litigation resulting in the seven executions we have had in Alabama in the last seven years. However, I will not advocate a result that has been held to be unconstitutional.

Unless Judge Reid changes the sentence in this case before it reaches the appellate stage, I will confess error on this issue in the Court of Criminal Appeals. I will do that in my capacity as an assistant attorney general representing the State on appeal, because I believe it is my duty to follow the Constitution as it has been interpreted by the Supreme Court, even if that interpretation came in a 5 to 4 decision (or actually, in a 5 to 3 decision).

I realize that you disagree. Even though it is not your responsibility to represent the State on appeal, because of the strength of your views on this subject, I will not object to you filing an amicus curiae brief arguing your position to the appellate courts. Indeed, I will be glad to join in any motion requesting that you be allowed to file such a brief, because I do not object to you advocating your position in the appellate courts. However, I have been assigned by the Attorney General the overall responsibility for deciding the position the State of Alabama takes on major issues arising in capital cases on appeal, and on this matter I intend to take the position I have explained to you.

The law seems clear to me, and I do not have any doubt about what the appellate courts will do, if necessary. It would be preferable for Judge Reid to follow the mandate of Thompson and correct the sentence now. However, that is up to him, not me.

Sincerely,

Ed Carnes
Assistant Attorney General
Chief, Capital Litigation
Division

EC:sf
cc: Hon. James H. Reid
Hon. Al Pennington

1745t

OFFICE OF THE DISTRICT ATTORNEY

ROBERT E. WILTERS
CHIEF ASSISTANT DISTRICT ATTORNEY
LAURA DAHLE
ASSISTANT DISTRICT ATTORNEY
CHARLES KENNETH SLADE
ASSISTANT DISTRICT ATTORNEY
LISA A. BRADFORD
ASSISTANT DISTRICT ATTORNEY

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY
TWENTY-EIGHTH JUDICIAL CIRCUIT

P. O. BOX 58
BAY MINETTE, AL 36507
(205) 937-0274

March 16, 1990

Honorable Ed Carnes
Assistant Attorney General
Chief, Capital Litigation Division
Office of the Attorney General
State House
Montgomery, Alabama 36130

In re: State of Alabama v. Clayton Joel Flowers

Dear Ed:

I have your letter of March 9, 1990, relative to Clayton Joel Flowers and your opinion of the state of the law after Thompson v. Oklahoma. I agree with you that everyone should obey the law, but it is my position that the Alabama Supreme Court has not held or interpreted Alabama's capital punishment statute as to whether the Alabama Legislature specifically intended to include juveniles within the ambit of the capital statute as far as punishment is concerned.

I am reluctant, as District Attorney of this County, to presume the interpretation in this regard, and honestly believe that this issue should be decided by the Supreme Court and should not be confessed by prosecutorial authorities.

I realize we differ in this view, but I assure you that my difference is based upon what I believe to be a matter of policy and legal standing. If the Attorney General confesses error in this regard, I would wish to be heard, but can assure you that I will do so with the utmost respect to the Attorney General and to you.

Thanking you for your letter of March 9, 1990, I remain,

Very truly yours,

JOHN D. WHETSTONE
District Attorney

/kh

Appendix D

OFFICE OF THE DISTRICT ATTORNEY

ROBERT E. WILTERS
CHIEF ASSISTANT DISTRICT ATTORNEY
LAURA DAHLE
ASSISTANT DISTRICT ATTORNEY
CHARLES KENNETH SLADE
ASSISTANT DISTRICT ATTORNEY

P.O. BOX 56
BAY MINETTE, AL 36507
(205) 937-0274

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY
TWENTY-EIGHTH JUDICIAL CIRCUIT

September 17, 1990

Honorable Don Siegleman
Attorney General
State of Alabama 36130

Dear Mr. Attorney General:

I have recently received an article which I have enclosed for your perusal concerning the death penalty and its application to juveniles.

The matter involves my prosecution and conviction of a 15 year old who sodomized a young lady in Bay Minette, beat her to death with a tire jack, and threw her body into a creek. While he was awaiting trial, he attempted to escape with another and a jail officer was beaten with a sock full of batteries. Every police officer who worked on the case informs me that he was one of the most dangerous individuals they had ever encountered. I concur.

The jury recommended life without parole and Judge Reid, after a hearing concerning the holding of Thompson vs. Oklahoma, set aside the jury verdict and imposed death.

I have read Thompson vs. Oklahoma and Judge Reid has read Thompson vs. Oklahoma and we are both in disagreement with Ed Carnes, your able Assistant Attorney General.

I must admit that Mr. Carnes is one of the leading experts in this field in this Country. I also must admit that the Supreme Court appeared, on a very narrow vote, to indicate that it would be inappropriate to execute anyone under the age of sixteen. The holding, however, includes language relative to the interpretation of juvenile law and the intent of Alabama's Legislature. I happen to have drafted portions of that law, and I am convinced that the intent of the Legislature was to treat fourteen year old juveniles the same as seventeen year old juveniles relative to a certification procedure to be treated as adults.

I fully realize the position of Mr. Carnes and can appreciate his legal ability. I am firm to the opinion, however, that if the Supreme Court wishes to hold that the execution of people under the age of sixteen is unconstitutional, that pronouncement must come from the Supreme Court of Alabama or the Supreme Court of the United States.

You are the Attorney General of this State, and I realize you may direct any case which you choose. Ed had indicated to me that he would allow me the privilege of being present and arguing against his motion. I appreciate that professional courtesy. If, on the other hand, you wish to direct me not to participate, I will obey your directive.

I would hope, however, that the Attorney General of this State would defend a judgment of death by electrocution which has been imposed by the Circuit Court of Baldwin County.

I remain,

Very truly yours,

JOHN D. WHETSTONE
District Attorney

/kh
cc: Ed Carnes

OFFICE OF THE
ATTORNEY GENERAL
DON SIEGELMAN
ATTORNEY GENERAL
MONTGOMERY, ALABAMA 36130
(205) 242-7300

STATE OF ALABAMA

October 17, 1990

Honorable John D. Whetstone
District Attorney
Twenty-Eighth Judicial Circuit
Post Office Box 58
Bay Minette, Alabama 36507

RE: Clayton Flowers v. State

Dear Dave:

Thank you for your letter concerning the appeal in this case. I have reviewed all of the correspondence between you and Ed Carnes concerning the matter.

In view of the Supreme Court's decision in Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), I cannot say that the position Ed has taken is wrong. However, I do want to ensure that the Court of Criminal Appeals hears your position, also. Accordingly, I have instructed Ed to do everything he can to ensure that you are allowed to file a friend of the court brief setting out your arguments. In that way, the Court will be able to hear both sides and can decide for itself whether the Thompson case forecloses the issue.

Sincerely,

Don Siegelman
Attorney General

DS:sf
cc: Ed Carnes

2351t

OFFICE OF THE DISTRICT ATTORNEY

ROBERT E. WILTERS
CHIEF ASSISTANT DISTRICT ATTORNEY
LAURA DAHLE
ASSISTANT DISTRICT ATTORNEY
CHARLES KENNETH SLADE
ASSISTANT DISTRICT ATTORNEY

P.O. BOX 58
BAY MINETTE, AL 36507
(205) 937-0274

JOHN DAVID WHETSTONE
DISTRICT ATTORNEY
TWENTY-EIGHTH JUDICIAL CIRCUIT

October 29, 1990

Honorable Don Siegelman, Attorney General
State of Alabama
Montgomery, Alabama 36130

Dear Don:

I have your letter of October 17, 1990, with regard to Flowers v. State.

I appreciate very much your response and understand the difficulty of Thompson v. Oklahoma and can readily understand the legal position taken by your able Assistant Attorney General, Ed Carnes.

Your professional courtesy in allowing me to file a friend of the Court brief setting out my arguments is greatly appreciated and I will do so in a manner which is respectful of any position taken by the Attorney General of this State.

I remain,

Very truly yours,

JOHN D. WHETSTONE
District Attorney

/kh
cc: Mr. Ed Carnes

NO. 91-1383

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALABAMA, Petitioner - Appellee

v.

CLAYTON JOEL FLOWERS, Respondent - Appellant

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

CERTIFICATE OF SERVICE

I, Thomas W. Sorrells, a member of the Bar of this Court, hereby certify that on this 21st day of February, 1992, three copies of the Petition for Writ of Certiorari and the Appendix to the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Honorable Thack H. Dyson, P. O. Box 998, Foley, Alabama, 36536, Honorable W. Donald Bolton, Jr., P. O. Box 259, Foley, Alabama 36536, and Honorable Al Pennington, P. O. Box 342, Mobile, Alabama 36601, counsels for the respondent herein. I further certify that all parties required to be served have been served.

Thomas W. Sorrells

JAMES H. EVANS
THOMAS W. SORRELLS
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300
Counsel for Petitioner